IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 17, 2008 Session

STATE OF TENNESSEE v. EMMETT RUSSELL MCGEE, JR.

Appeal from the Circuit Court for Bedford County
No. 16348 Robert Crigler, Judge

No. M2007-02872-CCA-R3-CD - Filed April 15, 2009

After the trial court denied a motion to suppress the evidence seized as a result of a warrantless search of Appellant's residence, Appellant, Emmett Russell McGee, Jr., pled guilty to two counts of possession of more than .5 grams of cocaine with the intent to sell. In exchange for the guilty pleas, Appellant received an effective sentence of twenty-one years. Appellant reserved the following certified questions of law for appeal:

> (1) Did the trial court err in denying the Defendant's Motion to Suppress on the grounds that the police officers had no warrant, consent or exigent circumstances to enter the defendant's residence?
>
> (2) Did the trial court err in denying the Defendant's Motion to Suppress the Search Warrant on the grounds that probable cause, stated in the affidavit in support of the search warrant, was insufficient in that it was based on information obtained from an uncorroborated criminal informant and from the officers' plain view observations during a warrantless entry into the residence?

We determine that the trial court properly denied the motion to suppress where the initial seizure occurred after police officers entered the residence without a warrant based on exigent circumstances. We further determine that the validity of the search warrant is not dispositive of the case on the basis that the motion to suppress was properly denied. Accordingly, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Fannie J. Harris, Nashville, Tennessee, for the appellant, Emmett Russell McGee, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Charles Crawford, District Attorney General, and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Appellant was indicted by the Bedford County Grand Jury on August 20, 2007, for one count of possession of 300 grams or more of cocaine with the intent to sell and one count of possession of more than 300 grams of cocaine with the intent to deliver after law enforcement officers discovered cocaine inside Appellant's residence. Appellant filed a motion to suppress the evidence in which he argued that the law enforcement personnel illegally entered his residence "without an arrest warrant, search warrant, or an exception to the warrant requirement."

The trial court held a hearing on the motion to suppress. At that hearing, Timothy Lane, the director of the Seventeenth Judicial District Drug Task Force testified that on September 14, 2006, he was involved in an undercover operation in Bedford County. Prior to that date, officers with the task force had been conducting undercover drug buys from an individual named Neal Greenway.

Mr. Greenway was arrested during a traffic stop on the evening of September 14, 2006. After his arrest, Mr. Greenway informed officers that he could take them to his residence in the Wartrace, Tennessee area and turn over "about a half ounce of cocaine" to the authorities. Director Lane and Agent Billy Osterman took Mr. Greenway to a residence at 655 Bell Buckle Road. During the trip to the residence, Mr. Greenway led the authorities "to believe there was nobody else at the residence."

When they arrived at the residence, to the agents' "surprise," Mr. Greenway knocked on the back door. Director Lane and Agent Osterman were "standing off to the side" at this point in order to avoid anyone identifying them as police officers. Mr. Greenway held a short conversation with someone inside the residence through a window. The door opened slightly, and Mr. Greenway continued to speak to someone inside the door of the residence. This person was later identified as Appellant.

When Appellant opened the door, Director Lane "was standing, . . . just a little bit behind the door, so [Director Lane] stepped around the door and . . . just pushed it back a little bit because [Appellant] had already opened it about halfway, and [Director Lane] opened it all the way so [Appellant] would be able to see [Director Lane]."[1] Director Lane stepped around to stand "in the doorway" and identified himself as a police officer. Director Lane was greeted with what he described as "the smell of marijuana . . . emitting from the interior of [Appellant's] trailer."

[1] The door to the residence opened outward.

While standing in the doorway, Director Lane "happened to look down the hallway" into the kitchen and living room. He saw a "very large black male trying to come up off of the couch" and "it appeared . . . he was like trying to make some type of furtive movement off of the couch." Director Lane did not know what the man's intentions were, whether he was going to "get a hold of some type of drug evidence and destroy it." Director Lane entered the residence at that time, again identified himself as a police officer and told the man, later identified as Sean Wade, to put his hands in plain view and sit back down on the couch.

Director Lane moved toward Sean Wade and noticed a bag of cocaine and a bag of marijuana on the end table. The director immediately took possession of these items and brought Appellant and Mr. Greenway into the living room to join Mr. Wade. Appellant's girlfriend and child were also present. Director Lane asked Appellant for consent to search the residence. Appellant and Mr. Greenway started "arguing." Eventually, Director Lane realized that no one was going to consent to the search, so he requested backup in order to leave the scene to procure a search warrant. Director Lane placed the men under arrest for possession of cocaine for resale and simple possession of marijuana.

Director Lane obtained a search warrant and went back to the residence. At that time, the authorities executed the search warrant. During the search, authorities seized a semi-automatic .9 mm machine pistol with a loaded clip, over 400 grams of cocaine, ammunition, marijuana, two sets of digital scales, over $5,000 in cash, a sawed-off shotgun, a .9 mm semi-automatic pistol with a loaded clip, and various items used for packaging cocaine for resale.

Appellant testified at the hearing that at around 8:00 p.m. he heard a knock on the door of his residence. When he "stuck" his head out the door, Director Lane "snatched [the] door out of [his] hand and bombarded his way in the threshold" of the residence. Later during the hearing, Appellant claimed that Director Lane gave him "a forearm to [his] chest" using "force" to shove Appellant out of the way. Appellant admitted during the hearing that he "had been smoking pot inside the house" before Director Lane arrived but stated that he also "had air freshener [he] had sprayed in the house, too." Appellant denied that Mr. Greenway lived at the residence but acknowledged that he was an overnight guest.

At the conclusion of the hearing on the motion to suppress, the trial court made the following findings of fact and conclusions of law:

> Director Lane and Agent Osterman and Greenway all went to the residence in question.
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> He told them that there was no one there.
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> To their surprise when they got on what was apparently a porch there at the door where there was a window, Greenway knocked instead of just walking in. You have to put yourself in the place of law enforcement at some point. For all they knew

at that point Greenway was setting them up to be shot. That is a plausible scenario. What he was doing caught them by surprise.

. . . .

At any rate at that point McGee opened the door half way and Director Lane and Agent Osterman stepped out of the way I guess for safety as much as anything.

When McGee opened the door half way, Director Lane testified that he stepped around the door and pushed it back and opened it completely and identified himself as a police officer. You can call that yanking the door open. That is just mincing words. That is what happened.

I don't find anything wrong with that under the circumstances.

You have somebody that - - you have Greenway taking them there, thinking that he lives there, and then he winds up knocking there and the next thing you know he is talking to somebody who opens the door.

So the natural thing for a police officer to do is identify himself to take control of the situation.

At which time the smell of marijuana was obvious. That is not a sham. The defendant himself said they were smoking marijuana there. Obviously he confirms what Director Lane said. At that point he had - - he did what is appropriate. He told Mr. McGee at the residence - - he smelled marijuana there and while looking past him in the doorway, as he, Director Lane were [sic] in the doorway, he saw a large black male come off of the couch inside and make a furtive movement. Director Lane's response for safety was to step forward to see if he was trying to destroy drugs or get a weapon. At that point he saw a bag of cocaine and marijuana in plain view.

That is reasonable for him to take that evidence and I see no reason to suppress that.

Quite frankly that is probably the end of my inquiry. I suspect at that point forward they apparently got a search warrant, came back and found more contraband.

Appellant filed a motion to reconsider the denial of the motion to suppress as well as a motion to suppress the search warrant. These motions were both denied. In a written order filed by the trial court, the court found the affidavit in support of the search warrant was sufficient to establish probable cause and that there was no fraud in the procurement of the search warrant.

Subsequently, Appellant pled guilty to two counts of possession of cocaine for resale, Class B felonies. The plea agreement specified that Appellant would receive a ten-year sentence and a $2,000 fine on count one and an eleven-year sentence and a $2,000 fine on count two. The sentences were set to run consecutively to each other, for a total effective sentence of twenty-one years. As part of the plea agreement, Appellant reserved two certified questions of law pursuant to Rule 37(b)(2) of the Tennessee Rules of Criminal Procedure. Appellant filed a timely notice of appeal. The certified questions of law on appeal are: (1) did the trial court err in denying Defendant's Motion to Suppress on the grounds that the police officers had no warrant, consent or exigent circumstances to enter Defendant's residence; and (2) did the trial court err in denying Defendant's Motion to Suppress the Search Warrant on the grounds that probable cause, stated in the affidavit in support of the search warrant, was insufficient in that it was based on information obtained from an uncorroborated criminal informant and from the officers' plain view observations during a warrantless entry into the residence?

Analysis

This Court will uphold a trial court's findings of fact in a suppression hearing unless the evidence preponderates otherwise. *State v. Hayes*, 188 S.W.3d 505, 510 (Tenn. 2006) (citing *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). On appeal, "[t]he prevailing party in the trial court is afforded the 'strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.'" *State v. Carter*, 16 S.W.3d 762, 765 (Tenn. 2000) (quoting *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998)). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *Odom*, 928 S.W.2d at 23. Our review of a trial court's application of law to the facts is de novo, with no presumption of correctness. *State v. Walton*, 41 S .W.3d 75, 81 (Tenn. 2001) (citing *State v. Crutcher*, 989 S.W.2d 295, 299 (Tenn. 1999); *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997)). When the trial court's findings of fact are based entirely on evidence that does not involve issues of witness credibility, however, appellate courts are as capable as trial courts of reviewing the evidence and drawing conclusions, and the trial court's findings of fact are subject to de novo review. *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000).

Both the Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution protect individuals against unreasonable searches and seizures by government agents. *See* U.S. Const. amend. IV; Tenn. Const. art. I, § 7. "These constitutional provisions are designed to 'safeguard the privacy and security of individuals against arbitrary invasions of government officials.'" *State v. Keith*, 978 S. W.2d 861, 865 (Tenn. 1998) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)). The Tennessee Supreme Court has noted previously that "[a]rticle I, [section] 7 [of the Tennessee Constitution] is identical in intent and purpose with the Fourth Amendment [of the United States Constitution]," and that federal cases applying the Fourth Amendment should be regarded as "particularly persuasive." *Sneed v. State*, 423 S.W.2d 857, 860 (Tenn. 1968).

Under both constitutions, "a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." *Yeargan*, 958 S .W.2d at 629 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971)); *see also State v. Garcia*, 123 S.W.3d 335, 343 (Tenn. 2003).

The most common exceptions to the requirement for a search warrant are: (1) consent to search; (2) a search incident to a lawful arrest; (3) probable cause to search with exigent circumstances; (4) in hot pursuit; (5) a stop and frisk situation; and (6) plain view. *See State v. Bartram*, 925 S.W.2d 227, 230 n.2 (Tenn. 1996). "If the circumstances of a challenged search and seizure come within one of the recognized exceptions, the fruits of that search and seizure are not subject to operation of the exclusionary rule and may be properly admitted into evidence." *State v. Shaw*, 603 S.W.2d 741, 743 (Tenn. Crim. App. 1980).

The Tennessee Supreme Court recently discussed the exigent circumstances exception to the warrant requirement in *State v. Meeks*, 262 S.W.3d 710 (Tenn. 2008). In *Meeks*, the court stated:

> Exigent circumstances arise where "the needs of law enforcement [are] so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Brigham City, Utah v. Stuart*, 547 U.S. at 403, 126 S. Ct. 1943 (quoting *Mincey v. Arizona*, 437 U.S. 385, 394, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978)). Given the importance of the warrant requirement in safeguarding against unreasonable searches and seizures, a circumstance will be sufficiently exigent only where the State has shown that the search is imperative. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); *State v. Hayes*, 188 S.W.3d at 514; *State v. Yeargan*, 958 S.W.2d 626, 641 (Tenn. 1997) (Reid, J., concurring). Although not an exclusive list, the following are frequently-arising situations that have been found to be sufficiently exigent to render a warrantless search of a domicile reasonable: (1) hot-pursuit, (2) to thwart escape, (3) to prevent the imminent destruction of evidence, (4) in response to an immediate risk of serious harm to the police officers or others, and (5) to render emergency aid to an injured person or to protect a person from imminent injury. *Brigham City, Utah v. Stuart*, 547 U.S. at 403, 126 S. Ct. 1943; *Minnesota v. Olson*, 495 U.S. 91, 100, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990); *United States v. Huffman*, 461 F.3d 777, 782 (6th Cir. 2006); *State v. Adams*, 238 S.W.3d 313, 321 (Tenn. Crim. App. 2005).
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> Exigent circumstances are those in which the urgent need for immediate action becomes too compelling to impose upon governmental actors the attendant delay that accompanies obtaining a warrant. Thus, in assessing the constitutionality of a warrantless search, the inquiry is whether the circumstances give rise to an objectively reasonable belief that there was a compelling need to act and insufficient time to obtain a warrant. The exigency of the circumstances is evaluated based upon the totality of the circumstances known to the governmental actor at the time of the

> entry. Mere speculation is inadequate; rather, the State must rely upon specific and articuable facts and the reasonable inferences drawn from them. The circumstances are viewed from an objective perspective; the governmental actor's subjective intent is irrelevant. The manner and the scope of the search must be reasonably attuned to the exigent circumstances that justified the warrantless search, or the search will exceed the bounds authorized by exigency alone. Where the asserted ground of exigency is risk to the safety of the officers or others, the governmental actors must have an objectively reasonable basis for concluding that there is an immediate need to act to protect themselves and others from serious harm.

Meeks, 262 S.W.3d at 723-24 (footnotes omitted).

Appellant argues on appeal that the "lack of a warrant, consent, or exigent circumstances" renders the search unconstitutional. Specifically, Appellant argues that the police actually created the exigent circumstances by approaching the door of the residence with Mr. Greenway. Appellant contends that when Mr. Greenway knocked on the door, they should have realized that he did not live at the residence. Further, Appellant argues that Director Lane actually entered the residence prior to the existence of any exigent circumstances. The State disagrees.

The facts from the hearing on the motion to suppress show that Director Lane and Agent Osterman accompanied Mr. Greenway to a residence that he had led them to believe was his own. The men were, as found by the trial court, "immediately confronted with an unexpected situation" when Mr. Greenway knocked on the door of the residence rather than entering. When the door opened, they were greeted with the odor of marijuana emanating from the residence. Director Lane opened the door the rest of the way, identified himself as an officer of the law, and stepped into the doorway with his toes on the "threshold" of the door. As he stood in the doorway, Director Lane saw a large man come off of the couch and make a "furtive movement."[2] Director Lane, afraid that the man was reaching for a weapon or about to destroy evidence, entered the residence and ordered the man to place his hands in the air. At this time, Director Lane saw marijuana and cocaine in plain view. We conclude that the record supports the trial court's determination that exigent circumstances justified the entry of the police into Appellant's home. At the time he entered the residence, Director Lane had an "objectively reasonable belief that there was a compelling need to act and insufficient time to obtain a warrant." *Meeks*, 262 S.W.3d at 723. Mr. Wade's action of coming off of the couch toward the officer created an "objectively reasonable basis for concluding

[2]Appellant argues that Director Lane was already in the residence when he saw Mr. Wade get up from the couch. During the testimony at the hearing on the motion, Director Lane made a physical demonstration regarding his position relative to the door of the residence. The testimony reflects that Director Lane described his feet as "inside the residence" and "at the threshold." The trial court determined at the conclusion of the hearing that the director was "in the doorway" at the time he saw Mr. Wade get up from the couch and make the furtive movement. Any conflict in the evidence is a matter that is "entrusted to the trial judge as the trier of fact." *Odom*, 928 S.W.2d at 23. The trial court saw the demonstration by Director Lane and determined that he was "in the doorway" rather than "inside the residence." We must defer to the judgment of the trial court.

that there [was] an immediate need to act to protect themselves and others from serious harm." *Id.* at 724. Appellant also seems to argue that the authorities somehow created the exigent circumstances by taking Mr. Greenway to the residence in violation of *State v. Hendrix*, 782 S.W.2d 833 (Tenn. 1989) (explaining that exigent circumstances created by law enforcement officers in order to provoke a defendant to commit a criminal offense violate a defendant's constitutional rights). We disagree. Director Lane and Agent Osterman did nothing to "tempt, induce, or entice [Appellant] to commit any criminal offense." *Id.* at 836. Appellant is not entitled to relief on this issue.

Validity of Warrantless Search

Appellant next argues that the trial court erred in denying the motion to suppress the search warrant. Because we have determined that the initial search of the residence that resulted in the seizure of cocaine and marijuana was valid, this issue is not dispositive of the case. For a question to be dispositive we "must either affirm the judgment or reverse and dismiss. A question is never dispositive when we might reverse and remand . . . if we . . . decided the question on its merits and found in favor of the defendant." *State v. Wilkes*, 684 S.W.2d 663, 667 (Tenn. Crim. App. 1984). Further, a question regarding suppression of the evidence is not dispositive if other incriminating evidence exists in the record outside the scope of that question. *State v. Dailey*, 235 S.W.3d 131, 135 (Tenn. 2007). The evidence obtained as a result of the warrantless search of the residence, i.e. cocaine and marijuana, was incriminating. Appellant is not entitled to relief on this issue.

Conclusion

For the foregoing reasons, the judgment of the trial court denying the motion to suppress is affirmed.

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JERRY L. SMITH, JUDGE